

The Administrative Tribunal,

Considering the application for execution of Judgment 2575 filed by Mr A. H. against the International Organization for Migration (IOM) on 27 March 2007, the IOM's reply of 29 May, the complainant's rejoinder of 21 June and the Organization's surrejoinder of 25 July 2007;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out in Judgment 2575, delivered on 7 February 2007, concerning the complainant's first complaint. Suffice it to recall that by a letter of 20 December 2005 the complainant, who was posted in Vienna, Austria, was informed that the Director General had decided to maintain his decision to assign him to the position of Chief of Mission in Berlin, Germany, as he was due for rotation. The Tribunal ruled that the decision of 20 December should be annulled and that the IOM should pay the complainant one euro in compensation for moral injury and 15,000 euros in material damages. It decided that the Organization should reinstate the complainant's entitlement to an education grant in respect of the cost of his son's education in Vienna. In addition it awarded him 4,000 euros in costs.

By a letter of 13 February 2007 the Director General informed the complainant that he had received Judgment 2575 and had noted that the Tribunal had ruled that the impugned decision should be annulled because the standard rotation procedure had been disregarded. However, it had not ordered that the complainant be reinstated to Vienna, where he was posted between 1998 and 2006; nor had it contested the fact that he was "subject to the authority of the Director General and to assignment by him to any of the activities or offices of the Organization". The Director General considered that the interests of the Organization would best be served by the complainant being posted in Germany as Head of the IOM's Special Liaison Mission. He had consequently decided, in accordance with the authority conferred on him by Staff Rule 8.111.12, to transfer the complainant within-grade to Berlin with immediate effect. He added that the decision of the Tribunal concerning education grant and financial compensation would be implemented by the Administration.

The complainant wrote to the Director General on 16 February 2007 to draw his attention to the fact that his decision, which had been conveyed to him in "final form" and without prior consultation, was in contradiction to the Tribunal's ruling in Judgment 2575. In a letter of 27 February the Director of the International Migration Law and Legal Affairs Department confirmed that the ruling of the Tribunal was being duly implemented by the Administration, as specified in the Director General's letter of 13 February. The payments due pursuant to Judgment 2575 were made to the complainant's bank account in early March 2007.

B. Citing the Tribunal's case law, the complainant submits that exhaustion of internal remedies is not necessary before filing an application for execution. He asserts that the decision of 13 February 2007 contravenes Judgment 2575. Indeed, no new decision concerning his transfer needed to be taken. Moreover, if the Administration had wished to take a new decision on that same issue it should have taken into consideration the reasons given by the Tribunal to annul the decision to transfer him to Berlin. The Organization having failed to do so, the complainant asserts that he was not required to exhaust internal means of redress before challenging the decision of 13 February 2007 before the Tribunal.

He contends that this decision "revives" the Director General's decision which was annulled by the Tribunal in Judgment 2575 as it is based on the same considerations and arguments as those discounted by the Tribunal in that judgment. In both cases the Director General decided, bearing in mind the Organization's interest, to transfer the complainant within-grade to Berlin as Chief of Mission. He submits that the challenged decision is tainted with the same procedural irregularities as those noted by the Tribunal in Judgment 2575 with regard to the decision of 20 December 2005. Indeed, both decisions were made without consulting him beforehand, in breach of Staff Rules

8.11, 8.112 and 8.113. Moreover, an annual compendium of vacancies, as required under Staff Rule 8.112, was not published. The decision was also taken in breach of Staff Rule 8.113, according to which the Appointments and Postings Board established under Rule 8.11 shall have a central role with regard to transfers.

The complainant alleges that the challenged decision results from a misreading of Judgment 2575. He explains that the Tribunal did not order his reinstatement because he did not ask to be reinstated. However, in annulling the transfer decision the Tribunal placed him *ipso jure* in the same legal position as before the decision. The Organization was therefore required to take the necessary measures to ensure that he could return to his previous position or to find him another assignment whilst taking into account the requirements of due process.

The complainant asks the Tribunal to set aside the decision of 13 February 2007, to order that he be put on travel status and paid a daily subsistence allowance for the period from 8 February 2007 “until the day his assignment complies with Judgment 2575” and to order “the reinstatement through the school year 2007-2008 of [his] entitlement to education grant in respect of [his] son’s education in Vienna”. He claims 4,000 euros in costs.

C. The IOM contends that the complainant’s request should not be considered as an application for execution of Judgment 2575 but as a request for review of a new decision to transfer him within-grade to Berlin. Indeed, unlike the decision set aside by the Tribunal in Judgment 2575, the Director General’s decision of 13 February 2007 was taken on the basis of Staff Rule 8.111.12, and not on the basis of the rotation policy. Consequently, the complainant should first exhaust internal means of redress. The Organization acknowledges that the term “transfer” was occasionally used with regard to the decision of 20 December 2005, but solely because it was convenient to describe the “move” of a staff member between two countries; that decision was nevertheless taken pursuant to the rotation policy.

The IOM expresses the view that Judgment 2575 has been duly implemented. It points out that the Tribunal did not rule that the complainant should be reinstated in the same position that he held prior to Judgment 2575, nor that he should not be “moved” from a post in Vienna to another post; it merely held that the decision to “move” the complainant was vitiated by a procedural flaw. It objects to the complainant’s contention that the decision of 13 February 2007 was taken in breach of due process and that it was tainted with the same procedural flaws as the decision of 20 December 2005. It stresses that the former decision was taken on the basis of Staff Rule 8.111.12, which concerns within-grade transfer, and not on the basis of the rotation policy set out in Staff Rules 8.112 and 8.113 or the Interim Rotation Procedures. It explains that within-grade transfers require a decision from the Director General that is based on the best interests of the Organization and that the publication of a compendium of vacancies or consultation with the transferee are not required for such a decision.

D. In his rejoinder the complainant reiterates his pleas. He emphasises that less than one week after the delivery of Judgment 2575 the Director General reassigned him to the same position as that to which he had been transferred pursuant to the decision that was annulled by the Tribunal. He also maintains that that decision was part of a rotation but was not made under Staff Rules 8.112 and 8.113, which outline the rotation policy. Indeed, the Tribunal noted in Judgment 2575 that “there [was] no dispute between the parties that the rotation policy, as provided by the above-mentioned Staff Rules, ha[d] not been followed in this case”. The complainant also points out that, in its reply to the complaint that gave rise to Judgment 2575, the Organization explained that “the Director General has ordered [the complainant’s] transfer within grade to Berlin [...]. Regardless of the rotation policy, the decision to transfer the respective heads [was] considered to be in the best interests of the Organization, a decision within the authority of the Director General.” The complainant draws attention to the fact that the wording used by the defendant in the aforementioned reply corresponds to the wording of Staff Rule 8.111.12.

E. In its surrejoinder the Organization argues that in Judgment 2575 the Tribunal focused solely on the application of the rotation policy, which, in its view, shows that the legal basis for the decision then challenged was Staff Rules 8.112 and 8.113. It reiterates that the Director General has the power outside the rotation policy to transfer a staff member to another duty station. Thus, in accordance with Staff Rule 8.111.12, he decided on 13 February 2007 to transfer the complainant within-grade to Berlin. It maintains that the complainant should first exhaust internal means of redress if he wishes to challenge that decision.

## CONSIDERATIONS

1. The complainant had held a D.1 post in Vienna from January 1998 until 1 July 2006, when he was

transferred to Berlin to another D.1 post. The Tribunal ruled in Judgment 2575 that the decision to transfer him to Berlin was tainted with procedural error insofar as the standard rotation procedure had not been followed and for this reason annulled it. Following the delivery of the Judgment the complainant indicated in an e-mail of 13 February to the Administration that he considered himself to be “automatically again assigned to Vienna”, and to that end asked that the “relevant Personnel Action transferring [him] to Vienna [...] be issued effective 8 February 2007”. Yet, he acknowledged that a *de facto* interim arrangement had existed since 8 February 2007 and that, for practical reasons, it might be necessary to prolong it for a limited period. Consequently, he requested that he be put on travel status and paid a daily subsistence allowance as of 8 February.

2. On 13 February 2007 the Director General informed him that the Administration understood the Tribunal’s findings in the sense that the complainant was “subject to rotation” and that even if his own previous decision was procedurally flawed, the Tribunal had not ordered the complainant’s “reinstatement to Vienna where [he was] posted from 1998 to 2006”. The Director General implicitly decided not to use the procedural rules invoked in the annulled decision and instead based his decision on Staff Rule 8.111.12. Indeed the defendant points out in its surrejoinder that the decision of 13 February was based on the aforementioned Staff Rule, according to which the Director General has the authority outside the rotation policy to transfer an individual to another duty station.

3. Both the complainant and the IOM were swift to produce their different interpretations of the Tribunal’s ruling in Judgment 2575. In fact the Organization simply decided to bring about the same result under a different normative ground.

4. The Tribunal notes that Staff Rule 8.111.12 is part of Staff Rule 8.111, which deals with the structure and scope of the Appointments and Postings Board and of Staff Rule 8.11 that provides that the Board “shall be established for the purpose of advising the Director General, pursuant to the following policy and procedures, on appointments and postings of staff”.

Staff Rule 8.111.12, on which the impugned decision is based, concerns within-grade transfers made by the Director General and provides that “[w]here the interests of IOM so require, the Director General has the authority to transfer within-grade any staff member to any post”. The Organization claims that while the decision annulled by Judgment 2575 was taken on the basis of the rotation policy set out in Staff Rules 8.112 and 8.113, the impugned decision “was based on the power of the Director General pursuant to [Staff Rule] 8.111.12 to transfer an official within grade, a power distinct from his authority to effect rotations”.

5. The same distinction between “transfers” and “rotations” was used by the Organization in its argument before the Tribunal in the previous case; it is again used in General Bulletin No. 2008 of 19 February 2007 concerning “Interim Procedures for Rotation”.

Yet, such usage is neither uniform nor constant, as recognised by the Organization itself, which admits that “in the pleadings leading up to [...] Judgment 2575 the verb ‘transfer’ was occasionally used when referring to application of the Rotation Policy” and points out that in Staff Rule 8.113.5 the word “transfer” is used to describe rotation.

6. The complainant argues that the decision of 13 February 2007 contravenes “the terms of the Tribunal’s ruling” in Judgment 2575, and therefore justifies his “submitting an application for execution of [that] Judgment” for which exhaustion of internal remedies is not necessary. He contends that even if the Organization uses different language in the impugned decision and in the decision that was annulled by the Tribunal in the aforementioned judgment, the decisions are nevertheless “identical”.

7. The IOM stresses that different rules and “a legally distinct basis” are at issue in each case, but it points out that “transfers” are always within-grade, while “rotations” may take various forms, including posting to another post at the same grade, promotion to a higher grade or external secondment.

8. The Tribunal finds that the impugned “decision” cannot be considered a new decision. It concerns the same person (the complainant), the same subject matter (the transfer to Berlin) and the same cause (implementation of Staff Rule 8.11) as in the decision which was annulled by Judgment 2575. Without ordering the complainant’s reinstatement, the impugned “decision” was no more than an attempt to implement, by a different route, the very decision annulled by Judgment 2575. Therefore, the complainant is entitled to apply for the execution of that judgment since “[t]he case law has it that the exhaustion of all internal remedies is not necessary before filing an application for execution” (see Judgment 1978, under 3).

9. The Tribunal considers that it is preliminary and conclusive to state that the impugned “decision” contravened Judgment 2575. Actually, in annulling the transfer decision the Tribunal placed the complainant in the same legal position that he was in before the decision was taken. The complainant’s reinstatement is an immediate and inevitable consequence of Judgment 2575. Therefore, the Organization must implement the Judgment by taking the consequent, material measures. The impugned “decision” dated 13 February 2007 must be declared null and void *ab initio* and the complainant must immediately be reinstated, at least administratively, in his former post in Vienna and must be placed on travel status for the period from 8 February 2007 until his reinstatement.

10. Consequently, the Tribunal orders the reinstatement through the school year 2007-2008 of the complainant’s entitlement to an education grant in respect of the cost of his son’s education in Vienna. The complainant is entitled to 3,000 euros in costs.

## DECISION

For the above reasons,

1. The impugned “decision” is declared null and void *ab initio*.
2. The Organization must immediately reinstate the complainant in his former post in Vienna, and put him on travel status for the period from 8 February 2007 until his effective reinstatement.
3. It shall reinstate the complainant’s entitlement to an education grant in respect of the cost of his son’s education in Vienna through the school year 2007-2008.
4. It shall also pay the complainant 3,000 euros in costs.

In witness of this judgment, adopted on 2 November 2007, Ms Mary G. Gaudron, Presiding Judge for this case, Mr Agustín Gordillo, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Mary G. Gaudron

Agustín Gordillo

Giuseppe Barbagallo

Catherine Comtet